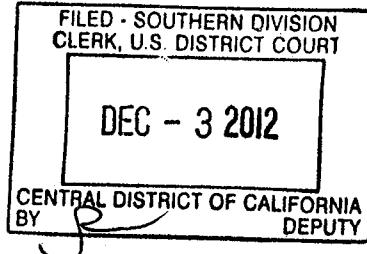


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DATED: 12-3-12

DEPUTY CLERK



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARMEN POGOSYAN, ) Case No. CV 12-10065-SVW (JPR)  
Petitioner, )  
vs. ) ORDER TO SHOW CAUSE  
RANDY GROUNDS, Warden, )  
Respondent. )

On November 26, 2012, Petitioner, through counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody. The Petition challenges Petitioner's 2003 sentence following his guilty plea in Los Angeles County Superior Court to manslaughter. Petitioner raises two claims: (1) "Petitioner is now being confined pursuant to an enhancement pursuant to Penal Code 12022.5(A)(1), even though Petitioner did not waive his right to a Jury Trial as to this issue," and (2) Petitioner should have been given credit for 1480 days of custody credits at the time of the sentencing but was only given credit for 851, representing a denial of the right to equal protection of the laws." (Pet. at 5.) Petitioner did not appeal his conviction or sentence. (Pet.

1 at 2, 3.) According to the California Appellate Courts' Case  
2 Information website, Petitioner filed a habeas petition in the  
3 state supreme court on November 14, 2011. (See also Pet. at 3-  
4.) It was denied on July 25, 2012, with a citation to In re  
5 Robbins, 18 Cal. 4th 770, 780 (1998), indicating that it was  
6 untimely. See Thorson v. Palmer, 479 F.3d 643, 644-45  
7 (9th Cir. 2007).

8 Under the Antiterrorism and Effective Death Penalty Act of  
9 1996 ("AEDPA"), Petitioner had one year from the date his  
10 conviction became final in which to file a federal habeas  
11 petition. See 28 U.S.C. § 2244(d). That statute provides:

12 (1) A 1-year period of limitation shall apply to an  
13 application for a writ of habeas corpus by a person in  
14 custody pursuant to the judgment of a State court. The  
15 limitation period shall run from the latest of--

16 (A) the date on which the judgment became  
17 final by the conclusion of direct review or the  
18 expiration of the time for seeking such review;

19 (B) the date on which the impediment to  
20 filing an application created by State action in  
21 violation of the Constitution or laws of the United  
22 States is removed, if the applicant was prevented  
23 from filing by such State action;

24 (C) the date on which the constitutional  
25 right asserted was initially recognized by the  
26 Supreme Court, if the right has been newly  
27 recognized by the Supreme Court and made  
28 retroactively applicable to cases on collateral

1 review; or

2 (D) the date on which the factual predicate  
3 of the claim or claims presented could have been  
4 discovered through the exercise of due diligence.

5 (2) The time during which a properly filed  
6 application for State post-conviction or other collateral  
7 review with respect to the pertinent judgment or claim is  
8 pending shall not be counted toward any period of  
9 limitation under this subsection.

10 Petitioner's conviction became final in early 2004, after  
11 the 60 days for filing a notice of appeal had expired. See  
12 Griffin v. Grounds, 472 F. App'x 527, 528 (9th Cir. 2012). Thus,  
13 absent some kind of tolling or a later trigger date, Petitioner  
14 had until early 2005 to file his federal Petition. He did not  
15 file it until late 2012, seemingly seven and a half years late.

16 As to ground one of the Petition, Petitioner seems to claim  
17 that he is entitled to a later trigger date under § 2244(d)(1)(C)  
18 or (D) because he did not recognize his rights until they were  
19 "clarified by the United States Supreme Court in Cunningham v  
20 California, 549 US 270 (2007)." (Pet. at 3; see also Pet.  
21 attach. at ii.) Even if that were true and provided a basis for  
22 a later trigger date, Petitioner's Petition would still be more  
23 than four years late given that, as Petitioner notes, Cunningham  
24 was decided in 2007, in late January.

25 Because Petitioner did not file any state habeas petition  
26 until 2011, he is not entitled to any statutory tolling. See  
27 Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding  
28 that § 2244(d) "does not permit the reinitiation of the

1 limitations period that has ended before the state petition was  
2 filed," even if state petition was timely under state law). In  
3 addition to statutory tolling, under certain circumstances, a  
4 habeas petitioner may be entitled to equitable tolling. See  
5 Holland v. Florida, 560 U.S. \_\_\_, 130 S. Ct. 2549, 2560, 177 L.  
6 Ed. 2d 130 (2010). But he must show that (1) he has been  
7 pursuing his rights diligently and (2) "some extraordinary  
8 circumstance stood in his way." See Pace v. DiGuglielmo, 544  
9 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669 (2005).

10 Petitioner seems to claim entitlement to equitable tolling  
11 for the following reasons:

12 This Petitioner's Application did not become timely until  
13 the expiration of his base term which, as indicated,  
14 occurred on July 28 of this year. It should be noted,  
15 however, that prior to that time and throughout the years  
16 2000 until recently the California Supreme Court and  
17 California Authorities continue to assert that no jury  
18 trial was required to establish a violation of the  
19 enhancement of Penal Code 12022.5(A)(1). This resistance  
20 and indifference to the Due Process Clause of the United  
21 States Constitution was manifested in People v Black 35  
22 Cal 4th 1238 (2005) and in Cunningham itself. Therefore,  
23 California Case Authority itself operated to prevent the  
24 Petitioner from pursuing his rights prior to the filing  
25 of his Petition in the California Supreme Court.

26 (Pet. attach. at iii.)

27 This explanation provides no basis for equitable tolling,  
28 because it does not explain why Petitioner could not have raised

1 his claims at least as early as Cunningham was decided. It is of  
 2 no moment when the sentence on his underlying conviction, without  
 3 the enhancement, expired; he knew of his claim at least as of  
 4 2007 and, under the law, most likely at the time he was  
 5 sentenced. Those are the operative dates under § 2244(d). Thus,  
 6 there appears to be no basis for tolling the limitation period.

7 One of Petitioner's two claims also appears to be  
 8 unexhausted. (See Pet. at 5-6 (conceding that he has not raised  
 9 ground two, challenging the calculation of his custody credits,  
 10 in the state court of appeal or supreme court.) Under 28 U.S.C.  
 11 § 2254(b), habeas relief may not be granted unless a petitioner  
 12 has exhausted the remedies available in state court.<sup>1</sup> Exhaustion  
 13 requires that the petitioner's contentions were fairly presented  
 14 to the state courts, Ybarra v. McDaniel, 656 F.3d 984, 991 (9th  
 15 Cir. 2011), cert. denied, 133 S. Ct. 424 (2012), and disposed of  
 16 on the merits by the highest court of the state, Greene v.  
 17 Lambert, 288 F.3d 1081, 1086 (9th Cir. 2002). As a matter of  
 18 comity, a federal court will not entertain a habeas corpus  
 19 petition unless the petitioner has exhausted the available state  
 20 judicial remedies on every ground presented in the petition. See  
 21 Rose v. Lundy, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203, 71 L.  
 22 Ed. 2d 379 (1982).

23 A federal court may raise the failure-to-exhaust issue sua  
 24

25  
 26       <sup>1</sup> A habeas petition "shall not be granted unless it appears  
 27 that - (A) the applicant has exhausted the remedies available in  
 28 the courts of the State; or (B) (i) there is an absence of available  
 State corrective process; or (ii) circumstances exist that render  
 such process ineffective to protect the rights of the applicant."  
 28 U.S.C. § 2254(b)(1).

1       sponte and summarily dismiss on that ground. See Granberry v.  
2 Greer, 481 U.S. 129, 134-35, 107 S. Ct. 1671, 1675, 95 L. Ed. 2d  
3 119 (1987); Stone v. City & Cnty. of S.F., 968 F.2d 850, 856 (9th  
4 Cir. 1992) (dictum).<sup>2</sup> A district court also has the authority to  
5 raise the statute-of-limitations issue sua sponte when  
6 untimeliness is obvious on the face of a petition; it may  
7 summarily dismiss the petition on that ground pursuant to Rule 4  
8 of the Rules Governing § 2254 Cases in the U.S. District Courts,  
9 as long as the court gives petitioner adequate notice and an  
10 opportunity to respond. Herbst v. Cook, 260 F.3d 1039, 1042-43  
11 (9th Cir. 2001).

12           IT THEREFORE IS ORDERED that on or before December 27, 2012,  
13 Petitioner show cause in writing, if he has any, why the Court  
14 should not recommend that this action be dismissed because it is  
15 untimely and because Petitioner has failed to exhaust his state  
16 remedies as to each of his claims. If Petitioner intends to rely  
17 on the equitable tolling doctrine, he will need to include with  
18 his response to the Order to Show Cause a declaration under  
19 penalty of perjury stating facts demonstrating that (1) he has  
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21           

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<sup>2</sup> In certain "limited circumstances," a district court may  
22 stay a mixed petition and hold it in abeyance while the petitioner  
23 returns to state court to exhaust an unexhausted claim. See Rhines  
24 v. Weber, 544 U.S. 269, 277, 125 S. Ct. 1528, 1535, 161 L. Ed. 2d  
25 440 (2005). Under Rhines, the prerequisites for obtaining a stay  
26 while the petitioner exhausts his state remedies are as follows:  
27 (1) the petitioner must show good cause for his failure to exhaust  
28 his claims first in state court, (2) the unexhausted claims must  
not be "plainly meritless," and (3) the petitioner must not have  
engaged in "abusive litigation tactics or intentional delay." Id.  
at 277-78. Petitioner has offered no explanation for why he did  
not earlier exhaust his custody-credits claim in state court.

1 been pursuing his rights diligently and (2) "some extraordinary  
2 circumstance stood in his way." If Petitioner can show that the  
3 Petition is timely and he seeks a stay of these proceedings in  
4 order to exhaust his unexhausted claim in state court, he must  
5 show that he can satisfy the three Rhines requirements.

6 Plaintiff is advised that his failure to timely comply with  
7 this Order may result in his Petition being dismissed for the  
8 reasons stated herein and for failure to prosecute.

9  
10 DATED: December 3, 2012

  
11 JEAN ROSENBLUTH  
U.S. MAGISTRATE JUDGE

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